Supreme Court, U.S.
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No. 02-446 (2)

In the
Supreme Court of the United States

FOREST OIL CORPORATION,
Petitioner,

v.

GULF CREWS INC., GULF BOAT MARINE SERVICES, INC. AND SECURITY INSURANCE COMPANY OF HARTFORD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13pp

QUESTION PRESENTED FOR REVIEW

1. Whether an action brought pursuant to 33 U.S.C. §905(b) arises under the LHWCA for purposes of excluding coverage under a vessel's protection and indemnity policy?

LIST OF PARTIES

Respondent is Security Insurance Company of Hartford, Inc. Respondent is wholly owned by Royal & Sun Alliance Insurance Group, plc (UK), whose stock is publicly traded on the London Stock Exchange.

Additional parties are Gulf Crews, Inc., Gulf Boat Marine Services, Inc., Peter J. Dahlen and Universal Ogden Services.

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Hodgen v. Forest Oil Corporation,
87 F.3d 1512 (1996) 6

Statutes:

33 U.S.C. § 905(b) . . . . . i, 3, 5, 7

STATEMENT OF FACTS

Forest Oil Corporation ("Forest") was the owner of an offshore platform on which an injury occurred to Peter Dahlen. Forest's wholly owned subsidiary, Island Operating Company ("Island"), operated the platform and was Dahlen's direct employer.

Security Insurance Company of Hartford, Inc. ("Security") was the protection and indemnity (P&I) insurer of the M/V BILLY JAY, a vessel owned and operated by Gulf Boat Marine Services, Inc. and Gulf Crews, Inc. (collectively "Gulf"). The M/V BILLY JAY serviced offshore platforms by bringing to them personnel and supplies. Gulf were original defendants based on Dahlen's allegations they failed to route the vessel to allow the efficient removal of groceries from the vessel, but the Trial Court granted Gulf's motion for summary judgment finding Gulf had no duty with regard to the loading of the grocery box and that Island was directing the movements of the vessel.[1] The summary judgment in favor of Gulf was not appealed.

Trial testimony established that the vessel was working for both Forest and Santa Fe Minerals, Inc., another offshore operator.[2] Island's dispatcher coordinated the routing of the vessel at all relevant times. This coordination was necessary to allow the vessel to work for both companies and to keep accurate the allocation of the charter costs between the companies.[3]

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[1] R. Vol. 3, p. 438.

[2] R. Vol. 14, p. 42, l. 6 - 10.

[3] R. Vol 13, p. 48, l. 22 - p.49, l. 16 (proffered testimony).

Gulf were made cross-defendants to Forest seeking indemnity under a written vessel time charter executed between Forest and Gulf. Security was made a third party defendant by Forest seeking coverage and a defense as an additional assured under the Security policy. Forest's motion for summary judgment on the issue of indemnity under the charter was denied by the Trial Court's January 9, 1998 memorandum ruling.[4] The Court found the charter did not require Gulf to indemnify Forest for claims brought by Forest employees, and in light of the previous ruling finding Dahlen Forest's borrowed employee, Dahlen was considered Forest's employee under the indemnity agreement.[5] This issue was not appealed. Forest appeals only the Fifth Circuit's ruling that Security owed no coverage to Forest under the facts of this case. In light of Forest being ultimately found free of fault for the injury to Dahlen, at issue is Forest's claim for reimbursement of its defense costs.

REASONS FOR DENYING THE PETITION

I.

The Fifth Circuit's classification of Dahlen's 905(b) claim as one "arising under the LHWCA" was accurate and in reference to exclusionary language within Security's policy.

Security concedes to Forest that the LHWCA via the 1972 amendments did not create a new right of action under

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[4] R. Vol. 4, page 600.

[5] R. Vol. 4, p. 604.

§905(b). Admittedly, these amendments simply preserved the existing right of a worker to sue a vessel, including an employer in the employer's capacity as a vessel owner or time charterer. However, this was not the issue before the Fifth Circuit. The issue before the Fifth Circuit was whether or not coverage was owed to Forest under Security's policy. The Fifth Circuit relied on Security's exclusion for liabilities "under any Compensation Act to any employee of the Assured to deny coverage." The opinion then goes on to state:

> As Forest is being sued under the LHWCA, the only question becomes whether Dahlen was its employee for purposes of the indemnity provision.

The operative word in both the policy and the Fifth Circuit's discussion is "under." The issue then becomes whether the §905(b) claim at issue is one that arises "under" the LHWCA for purposes of this exclusion in the policy. The §905(b) claim arises under the LHWCA because §905(b) allows such claims. Without the language in §905(b), the LHWCA would prevent Dahlen's claim against Forest.

It is clear the Fifth Circuit was not making the pronouncement regarding the origin of §905(b) claims envisioned by Petitioner. The Fifth Circuit was merely recognizing that a §905(b) cause of action comes "under," through, or as a result of, language found in the LHWCA. It is of no moment that such claims existed before the 1972 amendments. The 1972 amendments protected such claims, but such claims are still part of the LHWCA and, for purposes of interpreting this P&I policy, fit within the exclusionary language.

II.

While the Fifth Circuit relied on the exclusionary language of the policy, other reasons exist for denying Forest coverage under the policy.

The Fifth Circuit relied entirely on the aforementioned exclusionary language to deny Forest reimbursement for its defense costs under Security's policy. However, the record also supports denying Forest's claim on the basis that there was no potential for finding vessel-related fault once Gulf was dismissed and because a fact issue existed about whether Forest was the time charterer of the vessel at the time of Dahlen's injury.[6] As a result, regardless of the Fifth Circuit's finding that Dahlen's claim arose under the LHWCA, Forest's claim fails on alternate grounds.

Forest's argument that the lower courts lacked maritime jurisdiction matches Security's lack of coverage argument because of the absence of any vessel-related fault. Without the involvement of the vessel as an instrument to cause the injury to Dahlen, Dahlen lost his basis for maritime jurisdiction. Also, testimony was submitted that the vessel has to have some liability for the P&I coverage to come into play and, further, that the coverage given to a time charterer

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[6] Forest had the benefit of the defense provided by Security on behalf of Gulf and its vessel until Gulf were dismissed. However, Forest remained a defendant for its actions as platform owner and time charterer. Thus, any potential vessel-related liability was defended by Security for the benefit of both Gulf and Forest and any claim by Forest should be for its defense costs subsequent to the dismissal of Gulf and in Forest's capacity as platform owner/time charterer.

is never greater than that given the vessel owner.[7] Thus, Security agrees that it was inconsistent for the lower courts to allow Dahlen his §905(b) claim after it had been determined that the vessel was free from fault.

The lower courts presumably maintained maritime jurisdiction because Forest remained in the case in its capacity as time charterer. Security views the time charterer's potential fault as derivative of vessel-related fault; thus, once the vessel was dismissed the §905(b) claim should have also fallen. This issue became moot once Forest was found free of fault as time charterer; however, the lower courts' failure to address this issue in a way that may have satisfied Forest, and even Security and Gulf, is not relevant to the issue at hand. Forest confuses the issue by implying that the lower courts allowed the P&I coverage issue to support maritime jurisdiction. There is no indication the lower courts did so.

Security was made a third party defendant by Forest's pleading dated December 9, 1997.[8] This was about six months after the dismissal of Gulf. Security's position is that allegations of improper routing of a vessel in the context of how a grocery box was loaded, as opposed to allegations of negligence in actually directing the movement of a vessel in navigation, have never imposed liability on a time charterer and are not related to the vessel in a way to give rise to any potential vessel-related negligence (or coverage under the vessel's P&I coverage). The Trial Court's memorandum ruling of July 21, 2000 included the following comments:

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[7] R. Vol. 11, p. 1864 (p. 8), l. 7-11, p. 1865 (p. 10), l. 6-11.

[8] Vol. 4, p. 584.

> In an exhaustive review of all Fifth Circuit cases defining when a time charterer has liability, the Fifth Circuit pronounced that the traditional spheres of liability for a time charterer are choosing the vessel's cargo, route, general mission, as well as the 'specific time in which the vessel will perform its assignment.' *See Hodgen vs. Forest Oil Corporation*, 87 F.3d 1512 (1996). Although these spheres may be amended or limited by contract, there is no evidence presented to this court that any such contractual provisions exist. Furthermore, this Court notes that almost every case dealt with safety of the *timing of the unloading* due to dangerously rough seas. (emphasis in original)[9]

Forest simply wanted its goods delivered offshore and exercised no directive to the vessel on how to accomplish the mission. Furthermore, the actual theory of fault against Forest was a failure to *coordinate* the *information* regarding the vessel's route and the loading scheme in the grocery box. Gulf submit this did not fall within Forest's role as time charterer. This activity is more associated with Forest's role as platform owner/operator. Forest has no basis to argue coverage under the vessel's P&I policy for its actions as platform owner/operator.

As noted above, an issue exists as to whether Forest remained the time charterer at the time of Dahlen's injury. The evidence at trial showed the parties had evolved into a situation where Island was coordinating the information

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[9] Vol. 10, p. 1669, 1672.

regarding the use of the M/V BILLY JAY between Forest and Sante Fe Minerals. At the time, Gulf viewed Island as the chartering party.[10] The Fifth Circuit never reached this issue, but Security submits that Forest lacks coverage under the P&I policy because it was not the time charterer of the vessel at the time of the incident.

CONCLUSION

The Fifth Circuit opinion interpreted an exclusion in a vessel P&I policy based on the plaintiff's status as an employee bringing a claim against his employer. The LHWCA protects an employee's right to bring such a claim against his employer who has a dual capacity as time charterer. Petitioner has selected one word from a sentence in the Fifth Circuit opinion to characterize the opinion as one setting forth a new direction by the Fifth Circuit on the issue of §905(b) claims. The opinion does not do so. It merely interprets a P&I policy.

The ruling finding no coverage under this policy is correct because the injury was not caused by vessel-related fault and because Forest was no longer the time charterer of the vessel at the time of the incident. As such, the vessel's P&I policy does not apply and should not provide indemnity for Forest's defense costs in this case.

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[10] R. Vol. 14, p. 42, l. 6 - p. 43, l. 7.

Respectfully submitted,

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